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No. 07-1052

FILED
MAR 18 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division
Petitioner,

v.

FERNANDO GARCIA,
Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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In 1987, Garcia visited unspeakable horrors on three-year-old Veronica Rodriguez. For that crime, and after a constitutionally fair trial, he was sentenced to death. In 2007, based on this Court's recent pronouncements in *Abdul-Kabir*[1] and *Brewer*,[2] the court of appeals determined that in fact, Garcia's trial had been infected with constitutional error. But this error did not involve any of the hallmarks of a fair trial. He was not tried by a biased trial judge; he was not denied counsel, and he was not denied the right to represent himself. No racial discrimination tainted the selection of the grand jury. This was a public trial. And the reasonable-doubt instruction given to the jury was in no way defective. Rather, the jury instructions at the punishment trial — instructions that had been approved of since 1976 — did not permit the jury to give their "reasoned moral response" to Garcia's mitigating evidence. Disregarding the boundaries of federal habeas review and the well-established precedents of this Court, the court of appeals refused to pass on the question of whether this *Penry* error[3] — simple jury-charge error — can ever be amenable to harmless-error analysis. For these reasons, certiorari review should be granted.

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[1] *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654 (2007)

[2] *Brewer v. Quarterman*, 127 S. Ct. 1706 (2007).

[3] *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Penry v. Johnson*, 532 U.S. 782 (2001).

I. The Denial of Certiorari Review in *Nelson v. Quarterman* Was Not a Reflection on the Merits of the Question Presented. In Any Event, the Instant Case is Easily Distinguished.

Garcia spends a great deal of time arguing that the denial of certiorari review in *Quarterman v. Nelson*[4] forecloses certiorari review in the instant case. BIO at 10-13.[5] But this Court has reiterated time and time again that such "imports no expression of opinion upon the merits of the case." *Teague v. Lane*, 488 U.S. 288, 296 (1989) (citing *United States v. Carver*, 260 U.S. 482, 490 (1923) (Holmes, J.); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 366, n. 1 (1973); *Brown v. Allen*, 344 U.S. 443, 489-497 (1953)). *See also Equality Found. of Greater Cincinnati, Inc., v. City of Cincinnati*, 119 S. Ct. 365, 365-66 (1998) (opinion of Stevens, J., respecting the denial of the petition for writ of certiorari). Nor does it constitute "an appraisal of [the] merits [of the questions presented]." *Brown v. Texas*, 522 U.S. 940, 940 (1997) (opinion of Stevens, J., respecting the denial of the petition for writ of certiorari). Indeed, "[t]he 'variety of considerations [that] underlie denials of the writ,' counsels against according denials of certiorari any precedential value." *Teague*, 488 U.S. at 296 (quoting *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917 (1950) (opinion of Frankfurter, J.)). The only thing that can be gleaned from a denial of certiorari with any certainty is that four Justices could not agree that the

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[4] 127 S. Ct. 2947 (2007).

[5] "BIO" refers to the brief in opposition to certiorari review filed by Respondent Fernando Garcia, followed by page numbers. "PA" refers to the appendix to the Director's petition for certiorari review.

merits of the case should be heard. That aside, *Nelson* and *Garcia* present markedly different cases.

In *Nelson*, there was no prior criminal history to offer, so the State's evidence of future dangerousness centered on Nelson's violent nature and history of substance abuse. Tony Spence and his ex-girlfriend, Donna Dugger, friends of Nelson's, testified that Nelson drank "quite a bit" and used cocaine and marijuana. 4 RR 589; 5 RR 616-18.[6] Spence stated that Nelson angered easily when he was under the influence of drugs; on one occasion Nelson assaulted him for talking during a movie. 4 RR 592; 5 RR 623. Spence, along with Scott Simpson and Babbette Unthank, testified that Nelson also attempted to beat Simpson with a baseball bat because Unthank accused Nelson's brother of child molestation. 4 RR 594-600; 5 RR 603-669. Dugger also stated that she witnessed Nelson assault an individual in a grocery store parking lot. 5 RR 619-620.

Phillip Corbin and Elizabeth Torres, Howard County, Texas jailers, testified that while incarcerated awaiting trial, Nelson locked Corbin in a cell and then challenged him verbally and, on another occasion, evaded a bed check and hid in the hallway. 5 RR 686-690, 704-706. While Nelson claimed he was only playing a practical joke, his true intent appeared to be an escape. *Id.* at 730-731. Makeshift weapons — wire, broken razor blades, and a piece of tin from a coke can — were found secreted in the hallway where he had been hiding. *Id.* at 718, 722-723.

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[6] "RR" refers to the Reporter's Record of transcribed trial proceedings in *State v. Nelson*.

Against this, and in mitigation, Nelson presented evidence that

> (1) he was rejected by his mother, who had completely abandoned him by age [fourteen] ("abusive childhood" evidence); (2) he abused drugs and alcohol ("substance abuse" evidence); (3) he has troubled relationships with women; (4) he had a child out of wedlock, with whom he was not permitted to have a relationship; and (5) a psychiatrist testified he was suffering from borderline personality disorder ("mental disorder" evidence).

Nelson v. Quarterman, 472 F.3d 287, 290 (5th Cir. 2006) (*en banc*). *See also id.* at 303-05.

Thus, when faced with the question of whether the *Penry* error in Nelson's case was harmless, a review of the record might well "leave[] a conscientious judge in grave doubt about the likely effect of an error on the jury's verdict." *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995). "Grave doubt" means that, "in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." *Id.* And where there is "grave doubt," *O'Neal* mandates that relief be granted. *Id.* at 445. This is not the situation in the instant case.

Quite unlike Nelson, Garcia had an extensive and escalating criminal history, and each conviction involved a sexual assault or an attempted sexual assault. Each time, Garcia was given another chance to become a productive member of society. Each time he chose otherwise. Indeed, Garcia was on parole when, "[w]ith

extraordinary cruelty, [he] sexually abused and murdered [] three-year-old [Veronica Rodriguez] in 1987." PAI:2 (footnote omitted). A man with a 110 I.Q., Garcia created myriad excuses for his criminal behavior. He also claimed to be a born-again Christian, but absolutely nothing in the testimony heard during the punishment trial corroborates this. Certainly nothing about Garcia's own behavior reflects his alleged religious convictions.

Garcia told Dr. Powitzky that he had been neglected, exposed to witchcraft and other "bizarre experiences," and sexually abused as a child, but Dr. Powitzky admitted that he had been unable to verify this. The background he described to Dr. Schroeder stands in stark contrast to this: Garcia

> indicated that he was adopted at birth, and he never really knew his natural father. Apparently, his [grandparents] adopted him. His grandfather died prior to his birth. At that point, his adopted mother was [eighty-one] years old ... and lived with his brother and subsisted on Social Security. Apparently he had two natural brothers, one natural sister.

21 SF 2785.[7] Most tellingly, Garcia never discussed the sexual abuse supposedly perpetrated on him by his own mother and brother and others.

Garcia points out that a *Penry* analysis is not "'a matter purely of quantity, degree, or immutability.'" BIO at 20 (quoting *Brewer*, 127 S. Ct. at 1712). The Director

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[7] "SF" refers to the "Statement of Facts," the reporter's record of transcribed trial proceedings in *State v. Garcia*.

has never suggested otherwise. Such considerations, however, are wholly appropriate when conducting a harmless-error analysis. With that in mind, then, a thorough review of the record leaves no doubt that the *Penry* error was harmless. "[T]he evidence was not merely sufficient, but so powerful [and] overwhelming [] that the error simply [cannot] be said to have swayed the jury's judgment." *Cooper v. Taylor*, 103 F.3d 366, 370 (4th Cir. 1996) (*en banc*). Certiorari review should be granted.

II. The Director's Harmless-error Argument Is Properly Presented for Certiorari Review and Is Not Waived.

While it is true that harmlessness was not argued by the Director until late in the day, the lower court did not find, or even suggest, that the argument had been waived. Rather, the lower court specifically refused to address the question because it has not been passed on by this Court:

> That this instructional error mandates reversal of the death sentence flows from *Abdul-Kabir* and our en banc decision in *Nelson v. Quarterman*, 472 F.3d 287 []. Neither of those decisions, however, alters the basic rule that for "virtually all" other collateral challenges to state court convictions the appropriate standard of review is the "substantial and injurious effect" harmless error test found in *Brecht v. Abrahamson*. *See Fry v. Pliler*, 127 S. Ct. 2321, 2325 (2007) (citing *Brecht* [*v. Abrahamson*], 507 U.S. 619, 631 (1993)). Moreover, the question of whether some types of *Penry* error might be subject to harmless error review has not been squarely decided by and

> remains unsolved by the United States Supreme Court. *Smith v. Texas*, 127 S. Ct. 1686, 1699 (2007) [("*Smith II*")] (Souter, J., concurring).

PAI: 13.[8] Garcia's attempts to persuade this Court otherwise are unavailing when considered in this light. *See* BIO at 13-15.

In any event, this Court has previously considered whether constitutional error is harmless *sua sponte*, despite the fact that it had not been previously argued. *See Yates v. Evatt*, 500 U.S. 391, 407 (1991) ("[W]e have the authority to make our own assessment of the harmlessness of a constitutional error in the first instance.") (citation omitted); *Rose v. Clark*, 478 U.S. 570, 584 (1986) ("[W]e 'plainly have the authority' to decide whether, on the facts of a particular case, a constitutional error is harmless under the *Chapman* standard.")[9] (citing *United States v. Hastings*, 461 U.S. 499, 510 (1983)).[10]

In *Hastings*, the Court cautioned that reviewing records to determine harm should be done "sparingly." 461 U.S. at 510 (citations omitted). A primary concern should be, and is, judicial economy. *Yates*, 500 U.S. at 407 ("Because this case has already been remanded twice, once for harmless-error analysis, we think we

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[8] Contrary to Garcia's arguments, that Justice Souter was compelled to make the statement he did strongly suggests that a harm analysis is *not* subsumed within the question of whether there was *Penry* error in the first place. *See* BIO at 22-25.

[9] *Chapman v. California*, 386 U.S. 18 (1967).

[10] *Cf. Teague*, 489 U.S. at 300 (addressing retroactivity despite the fact that it was raised only in an amicus brief).

would serve judicial economy best by proceeding now to determine whether the burden-shifting jury instructions were harmless."). Concurring in *Nelson*, Judge Dennis cited *United States v. Giovanetti*, 928 F.3d 225 (7th Cir. 1991) (per curiam) (on reh'g), which does weigh judicial economy. 472 F.3d at 331-32. There, the Seventh Circuit determined that a decision to "overlook a failure to argue harmlessness" should consider (1) "the length and the complexity of the record," (2) "whether the harmlessness of the error or errors found is certain or debatable," and (3) "whether a reversal will result in protracted, costly, and ultimately futile proceedings in the district court." *Giovanetti*, 928 F.2d at 227. Judge Dennis applied these factors and concluded that it was "clear" harmlessness should not be considered *sua sponte*. *Nelson*, 472 F.3d at 332. But this analysis did not consider that "the arguments that the [Director] does make provide assistance to the court on the harmlessness issue." *United States v. Rose*, 104 F.3d 1408, 1415 (1st Cir. 1997). *See also United States v. McLaughlin*, 126 F.3d 130, 135 (3rd Cir. 1997) (remarking that "the certainty of harmlessness does not appear with such clarity from an *unguided search of the record* that we should raise the issue on our own motion.") (internal quotation marks and citation omitted) (emphasis added).

More importantly, the *Giovanetti* factors do not consider the unique concerns underlying federal habeas review. The AEDPA was specifically enacted to prevent abuses and delays in habeas corpus litigation. It has specific and strictly enforced rules regarding successive petitions and exhaustion. *See* 28 U.S.C. §§ 2244(a), (b); 2254(b), (c). These rules were crafted to ensure piecemeal litigation was a thing of the past and to prevent petitioners from being in charge of the litigation, deciding

when and how to bring their claims into federal court. Judicial economy and fairness, respect for the state courts, comity and the importance of a final judgment all played into the enactment of this legislation. *E.g.*, *McClesky v. Zant*, 499 U.S. 467, 489-93 (1991).

It is these concerns that have provided guidance on the issue of whether a federal court may apply an affirmative defense — exhaustion, non-retroactivity, procedural default — not raised by the State or, alternatively, consider such a defense raised for the first time on appeal. *See Granberry v. Greer*, 481 U.S. 129, 133 (1987) (federal appellate courts have discretion to consider the issue of exhaustion *sua sponte*); 28 U.S.C. § 2254(b)(3) (same); *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) (federal courts may *sua sponte* raise the issue of *Teague* non-retroactivity); *Trest v. Cain*, 522 U.S. 87, 90 (1997) (recognizing that courts of appeals have all held that a procedural default may be raised *sua sponte*). Additionally, the Court has recognized that the State is "entitled to rely on any legal argument in support of the judgment below," even arguments not presented to the lower courts. *Schiro v. Farley*, 510 U.S. 222, 228-29 (1994) (citing *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970)).

Recently, the Court reaffirmed the reasoning of *Granberry*, *Caspari*, and *Trest*, and held that a federal court may *sua sponte* apply the AEDPA statute of limitations against a habeas petitioner where the State has failed to do so, as long as: (1) the parties are accorded notice and an opportunity to address the issue; (2) the petitioner is not prejudiced by any delay; and (3) the interests of justice are served. *Day v. McDonough*, 547 U.S. 198, 210-11 (2006). The *Day* Court explained that

the statute of limitations "'promotes judicial efficiency and conservation of judicial resources, safeguards the accuracy of state court judgments while the record is fresh, and lends finality to state court judgements within a reasonable time.'" *Id.* at 205-06 (quoting *Acosta v. Artuz*, 221 F.3d 117, 123 (2d Cir. 2000)).

The *Day* factors are specifically suited to the harmless-error context. The *Brecht* harmless-error standard rests on the same policy justifications as exhaustion, non-retroactivity, procedural default, and limitations. Namely, "the State's increased interest in the finality of convictions," comity, and federalism during collateral review. *Brecht*, 507 U.S. at 635. Thus, this Court should be permitted to *sua sponte* raise harmless error in any case in which it might also raise exhaustion, non-retroactivity, limitations, or procedural default where the *Day* factors are satisfied. Importantly, Garcia has not suggested how he was or might be prejudiced by any delay. And given that the facts underlying any harmless-error review are the same as those involved in a *Penry* analysis — they are merely viewed through a different lens — it is questionable whether he could even make such a showing. And as in *Day*, nothing in the record suggests that the Director "strategically withheld the defense or chose to relinquish it" in this case.[11] 547

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[11] *See Saldano v. Cockrell*, 267 F.Supp.2d 635, 644 (E.D. Tex. 2003) ("The respondents'[s] failure to raise the harmless error defense in those cases[] was due to either inadvertence or a mistaken belief that the issue would not be material, rather than the product of deliberate waiver."). Indeed, that a *Penry* claim might be subject to a harmless-error analysis answer was first raised by a judge on the court of appeals. *See Nelson v. Dretke*, 442 F.3d 282, 310-11 (5th Cir. 2006) (Dennis, J., concurring in the judgment).

U.S. at 211.

The AEDPA circumscribes the role of federal courts to ensure only that persons do not remain in custody because of violations of the United States Constitution, or its laws and treaties. *See* 28 U.S.C. § 2254(a). As this Court has explained, unless a defendant is in custody due to a constitutional, or other, violation, federal courts must yield to the state judicial process. *See Barefoot v. Estelle*, 463 U.S. 880, 887-88 (1983). "Thus, before granting the writ of habeas corpus to a petitioner whose state custody resulted from a criminal conviction, we must determine whether the petitioner's trial violated his federal rights and whether that violation was the cause of his detention, i.e., whether the error was harmful." *Cooper*, 103 F.3d at 370. The interests of justice — finality, comity, and federalism — strongly favor consideration of whether *Penry* error can ever be amenable to a harmless-error analysis. Therefore, certiorari review should be granted.

III. The Question Presented Has Relevance Well Beyond the Context in which It Is Raised.

The question of whether *Penry* error is amenable to a harmless-error analysis may, at first blush, seem like a narrow one. *See* BIO at 16-18. It is not. It should not be considered solely in the context of those few remaining Texas-death-row inmates that may be affected by this Court's *Penry* jurisprudence. It should not be brushed aside simply because the lower court's opinion is unpublished. Rather, the question should be considered, as the Director asserted in his petition, in the broad scheme of what is — and is not — trial error.

In *Nelson*, the court of appeals determined that the because the jury charge error at issue arose in the context of a death penalty trial — and thus involved a "moral judgment" — it is structural error subject to automatic reversal. 472 F.3d at 314-15. The court then used *Nelson* to avoid a harm analysis in the instant case. PAI: 13. But the reasoning of *Nelson* finds no support in this Court's precedents.

First, *Penry* error is nothing more than jury-charge error. *See Smith II*, 127 S. Ct. at 199 (Alito, J., dissenting) ("The federal constitutional error that occurred in the penalty phase of petitioner's trial and that was identified in *Smith v. Texas*, 543 U.S. 37 [] (2004) (*per curiam*) [], concerned a flaw in the jury instructions[.]"). As such, *Nelson*'s determination flies in the teeth of this Court's well-established precedent holding that jury charge error is nearly always trial error and thus subject to a harm analysis. *See* Petition at 25-26 (listing cases). Second, merely because it arises in the context of a death penalty case does not mean that it automatically gives rise to structural error. As this Court recognized in *Mitchell v. Esparaza*, "a number of our harmless-error cases have involved capital defendants[.]" 540 U.S. 12, 16-17 (2003) (per curiam) (citing *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (unconstitutional admission of coerced confession at guilt stage); *Clemons v. Mississippi*, 494 U.S. 738 (1990) (unconstitutionally broad jury instructions at sentencing stage); *Satterwhite v. Texas*, 486 U.S. 249 (1988) (unconstitutional admission of evidence at sentencing stage), and *Ring v. Arizona*, 536 U.S. 584, 609, n. 7 (2002) ("We do not reach the State's assertion that any error was harmless because a pecuniary gain finding was implicit in the jury's guilty verdict.")).

Importantly, this Court has just recently granted certiorari review in a case where the Court of Appeals for the Ninth Circuit held that a jury charge error involving instructions on alternative theories of criminal liability was in fact structural, thus subject to automatic reversal. *Chrones v. Pulido*, — S. Ct. — , 2008 WL 482035 (Feb. 25, 2008) (No. 07-544). Like the court of appeals in that case, the court of appeals in this case has created a potentially enormous exception to the mandate of *Fry*, that is, that trial error is to be reviewed "under the 'substantial and injurious effect' standard set forth in *Brecht*, 507 U.S. 619 [], whether or not the state appellate court recognized the error and reviewed it for harmlessness under the 'harmless beyond a reasonable doubt' standard set forth in *Chapman*, 386 U.S. 18 []." 127 S. Ct. at 2328. Under *Nelson*'s reasoning, anytime there is jury-charge error during the punishment trial of capital-murder trial, it could well be classified as structural, thus abrogating *Fry* for simple instructional error. The concerns and purposes of federal habeas review demand that such cannot be left standing.

CONCLUSION

For the foregoing reasons, this Court should grant the Director's petition for writ of certiorari.

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